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IN THE

United States District Court

WESTERN DISTRICT OF NORTH CAROLINA

ASHEVILLE DIVISION

Civil No. 2138

SWITZERLAND COMPANY, a Corporation, and JOSEPH H. WALKER,
Plaintiffs

vs.

STEWART L. UDALL, CONRAD WIRTH, and SAM P. WEEMS,
Defendants

MEMORANDUM OPINION

CARSWELL AND JUSTICE,
Charlotte, North Carolina
Attorneys for Plaintiffs

WILLIAM MEDFORD,
United States Attorney

ROBERT J. ROBINSON,
Assistant United States Attorney
Asheville, North Carolina
Attorneys for Defendants

WARLICK, *District Judge.*

This action, filed on April 3, 1963, is brought by the plaintiffs against the defendants as another in a series of lawsuits instituted by them and having to do with the same subject matter, but against different defendants.

Following the hearing of any number of motions and incident rulings, it ultimately reached trial and was heard in the Charlotte Division by agreement, during the first week in November past, when a full hearing was had.

The action primarily seeks to have the defendants show cause why a mandatory injunction should not be entered requiring them to remove certain physical obstacles and barriers erected by them across certain access roads along the Blue Ridge Parkway, and to restore said roads to their original condition; and to permanently enjoin and restrain the defendants from interfering with the use of said roads, or any of the accesses thereto, a recovery being sought under Chapter 85, Sec. 1361 of Title 28, U. S. Code, as enacted by the Congress on October 5, 1962. 76 Stat. 744.

From the pleadings and the voluminous records, together with the exhibits offered and evidences heard at the trial, and in keeping with Rule 52 Title 28, U. S. Code, the following facts are found.

The Plaintiff, Switzerland Company is a corporation organized under the laws of North Carolina, and Joseph H. Walker is a resident and citizen of the State of Florida.

The defendant Stewart L. Udall is Secretary of the Interior of the United States of America and is charged with the adminstration and control of the Department of the Interior, and its various agencies, among which is the National Park Service. Conrad L. Wirth is the Director of the National Park Service, and as such is charged with the responsibility for the maintenance and administration of all National Parks,

including Blue Ridge Parkway. Sam P. Weems is Superintendent of the Blue Ridge Parkway and as such is charged with the maintenance, administration and control of said Parkway, and the enforcement of the laws and regulations governing its maintenance and use. That all three are officers, agents and employees of the United States of America.

The defendants Udall and Wirth are officially residents of the District of Columbia but actually reside in the State of Maryland. The defendant Weems is a citizen and resides in the State of Virginia.

The Switzerland Company, following its incorporation in 1909, became the owner of approximately 1200 acres of land, as is shown by the conveyance to it by the late Heriot Clarkson, an attorney of Charlotte, North Carolina, who had previously purchased said lands in varying tracts through the years past. He was the majority and controlling stockholder, and its directing head.

The property as such was held for development and sale as a recreational section for summer vacationers and home owners. It lay atop and along the crest of the Blue Ridge Mountains in Mitchell and McDowell Counties. Roads were developed and accesses were made to various spots; some homes were built and generally its position reflected its promoters' ideas. Obviously it was a highly regarded area. Home sites were sought after and through restrictions the purchasers were selected. An observation tower, erected from native stone had been built and *access to it for public use was laid out*. Atop this tower a beautiful panoramic view of the valleys lying below was possible and the grandeur of the mountains could be obtained. The tower was given the name of Kilmichael.

Sometime during the early ninteen thirties the Congress of the United States enacted legislation creating the Blue

Ridge Parkway through the states of Virginia and North Carolina, and between the Shenandoah and the Great Smoky Mountains National Parks, and authorized the acquisition of a right-of-way for said Parkway of sufficient width, but not exceeding a maximum of 200 ft., and setting out therein the manner of the acquisition of said right-of-way, its administration and maintenance and otherwise providing for its construction, the routes to be laid out as nearly as possible so as to generally follow the crest of the Blue Ridge Mountains, through these two states, and being about five hundred miles in length.

Incidentally this legislation brought about the fulfillment of a dream entertained by millions through the years and has created one of the great travel areas in Eastern America.

Simply stated, among other things the law as enacted by the Congress required that the Governing Officials of the two states through which it was to be constructed, were to convey to the United States a title in fee simple to the right-of-way, free and clear of any incumbrances.

When the necessary surveys had been made and the routes selected and accepted, and the notices given, the State of North Carolina undertook through the various laws necessary as enacted by its General Assembly to acquire the needed areas by purchase or condemnation. Failing to secure title by agreement and conveyance, and pursuant to Chapter 2 of the Public Laws of North Carolina, Session 1935, as amended by Chapter 42 of the Public Laws of said state, 1937, and by virtue of Chapter 33 of North Carolina General Statutes entitled "Eminent Domain," the State of North Carolina, through its agency, the North Carolina State Highway and Public Works Commission, as the above statutes required, filed the maps and other evidences showing the right-of-way in the office of the Register of Deeds for Mitchell County

and similarly in the office of the Register of Deeds for McDowell County, on the 28th of April, 1937, indicating that this state agency as of the date of such filing had appropriated for use as a federal parkway, the lands described and set out in the maps filed — thereby condemning 74.47 acres, in fee simple, and approximately 12.12 acres of land, for the purpose of an easement for said Blue Ridge Parkway, together with an additional 1.73 acres known as the "J. W. Cox" land, all of which lands condemned were owned and held by the Switzerland Company.

This project affecting the Switzerland Company and its ownership of said lands as condemned, was designated as Sec. 2-L of the Blue Ridge Parkway, which maps as filed, in the offices of the Register of Deeds for the two counties and used as the medium of condemnation do not include any roads, public or otherwise as set out thereon.

Thereafter, on March 4, 1938, the State of North Carolina, through its then Governor Clyde R. Hoey, acting for and at the request of its agency, the State Highway and Public Works Commission, executed and delivered to the United States of America, acting on behalf of and at the request of its agency, The National Park Service of the Department of the Interior, a warranty deed in fee simple, wherein among other things conveying to the United States by such deed, the 74.47 acres in fee simple and approximately 12.12 acres which had been taken for the purpose of a scenic easement; including the 1.73 acres of the "J. W. Cox" land, all previously owned by the Switzerland Company. This deed was duly registered.

That subsequently and in the six months period as required by the law, the Switzerland Company filed its petition, having failed to agree with the State of North Carolina as to the value of the land so taken by condemnation, and set out that

it had suffered a loss through the value of the land taken and the damage to the remainder of the land by such taking in the sum of $50,000. An answer was thereupon filed by the defendant, The North Carolina State Highway and Public Works Commission, in which it sets up various defenses as was shown therein.

Various required steps were taken, commissioners were appointed, and a study of the premises made and a report filed by such appraisers. An Appeal was thereafter taken to the Findings made and filed and the action was thereupon set down for trial on its merits in the Superior Court of Mitchell County.

The cause was heard at the March 1939 term of the Superior Court of such county, at which hearing I presided, for that at such time I was a Judge of the Superior Court of North Carolina. Now, a quarter of a century later, the cause comes back to me for an additional determination as a District Judge of the United States.

One issue was submitted to the jury, in words as follows: "1. What sum, if any, is petitioner entitled to recover of the defendant for the appropriation of and damage to lands of the petitioner described in the petition, over and above all general and special benefits accruing to petitioner's lands by reason of the construction of the parkway?"

After a trial lasting one week, in which four night sessions became necessary, the jury selected to try the cause and coming as it did from a county other than Mitchell, answered the issue: "$25,000.00."

The defendant, the North Carolina State Highway and Public Works Commission, perfected its appeal to the Supreme Court of North Carolina where the trial below was affirmed. Switzerland Co. v. Highway Commisison, 216 N. C. 450-462.

At such hearing in the Superior Court Mr. Heriot Clarkson, who had long previous to the time of the trial become a Justice of the Supreme Court of North Carolina, and who was yet majority stockholder and an officer in the Switzerland Company, testified at considerable length, and gave his opinion as to the damage suffered and sustained by the Switzerland Company by the taking of the lands conveyed to the United States. Among other things with respect thereto, he was asked the following question: "Q. Tell the jury whether there is any reservation by the Highway Commission of North Carolina, or any division in it that you ever read which reserved or which required an exit from or entrance to the parkway from one end of the Little Switzerland property to the other? A. No. There is not." This particularly being set out since the case in the Superior Court before me was tried wholly upon the theory of damages for a recovery of the value of the lands taken, with the scenic easement acquired. Additionally as the issue sets forth, a recovery was likewise sought for any damage sustained to the remainder of the tract, the abolishment of roads, etc., over and above all general and special benefits accruing.

The judgment was satisfied in full by the State of North Carolina making payment of the amount awarded by the jury.

The United States was not a party in any wise to that particular lawsuit.

An examination of the record of the trial incidentally shows that the attorneys for the Switzerland Company requested that the court give certain preemptory instructions, among them being the following:

> "Gentlemen of the Jury, there has been introduced in evidence in this case a deed from the State of North Carolina to the United States Government conveying the premises described therein and in said deed certain reserva-

tions were made. I charge you that no evidence has been offered in this case of any conveyance or reconveyance, either to the State of North Carolina or its citizens, of any easements or rights in the property so acquired by any deed or instrument sufficient in law to reinvest in the State or in any of its citizens any rights or easements which were not reserved in the deed," and "I further charge you that under the laws of the United States, the Secretary of the Interior has only a limited right to grant concessions or make leases for a limited time, and that under said law there is no authority to grant a permanent right privilege or easement which could only be authorized by an act of Congress."

This instruction was given. On the appeal to the Supreme Court exception was taken to such preemptory instruction, but in the opinion by Mr. Justice Schenck, it was stated: "These are correct statements of the evidence and of the law, and the exceptions thereto are untenable."

The deed executed and delivered to the United States as aforesaid contained full covenants of warranty, and incidentally the following stipulation:

"Be It Clearly Understood, however, that the purpose of this conveyance is to transfer to the Grantee the proprietary estate in the lands described and it is not to be construed as a surrender of state sovereignty over the area embraced in the description herein set out; expressly reserving the right to maintain existing public roads within or across said area, subject to such change of location as may be mutually agreed to by supplementary contract."

On August 30, 1938 the North Carolina Highway Commission and the United States of America, each acting by and through their respective designated agents, entered into a cooperative agreement or supplementary contract as the

deed of conveyance required, wherein the roads which would be annulled were listed and those to be retained and the new ones to be built were specifically spelled out, particularly so as they might affect the parkway and its uses, and to fully conform to the designation and alignment of such parkway. These roads were all constructed and the accesses made and a full compliance had in line with such cooperative agreement — it being executed prior to the trial in the Superior Court, was available at such trial and its contents made known to the jury, through its introduction in evidence. Accordingly all connected with the trial fully knew the exact status of the public roads and of the accesses to the parkway. Kilmichael Tower roadway was ultimately graded and opened with a width of ten feet, and shown as a private road, as the Department of the Interior's official map of the Blue Ridge Parkway show all access roads claimed by plaintiff as private roads — and accesses to the parkway were made from both the north and south sides thereof.

Following the completion and opening of the Blue Ridge Parkway through the lands of the Switzerland Company and in furtherance of the authority of the Secretary of the Interior to grant limited rights and concessions or to make leases for a limited time, and none other, a special use permit dated October 20, 1948, was executed by the acting Superintendent, Blue Ridge Parkway, and accepted as tendered by the Switzerland Land Company by Reid Queen, Agent. Authority was given under such permit for a term of one year from January, 1949, to December 31, 1949, to use and maintain an existing ten foot wide private road from the right-of-way line to the Kilmichael Tower, and from both sides of the parkway lands, all as is shown by the blueprint attached to said permit, and thereby provide access to Kilmichael Tower. This permit was to be automatically renewed annually for a period not to exceed ten years. This permit expired on December 31, 1958.

It would seem likely that prior permits had been entered into on the date of the completion of the parkway for periods as shown and were renewed as this special permit indicates, however none were introduced other than those above. Some several additional use permits were entered into for the purpose of providing water for the adjacent community, sewage disposal facilities, and other factors, which the United States was agreeable to grant for the use and betterment of the lands of petitioner, the Switzerland Company — all signed by Reid Queen, Agent for the Switzerland Company, Little Switzerland, North Carolina. It seems that the Parkway service dealt with the Switzerland Company throughout all of its dealings following the completion of the Parkway, as the Switzerland Land Company, since each permit offered into evidence in this hearing was so denominated.

In Defendant's Exhibits 9, 10 and 11, to which reference has been made, it appears that Reid Queen, Agent, executed all of said exhibits which had to do with accepting the leases and permits from the Department of the Interior of the United States, National Park Service. Incidentally, Exhibit 9, signed by Reid Queen, as Agent, on its expiration on December 31, 1958, was on said date renewed for an additional ten year period by Francis O. Clarkson, Jr., President of Switzerland Company. It will be noted that the agent in charge of the Blue Ridge Parkway again used the word "Switzerland Land Company," Little Switzerland, North Carolina, as the official name in said permit. Before signing, it appears that Mr. Clarkson, President, erased the word "land" from the permit.

I find further that defendants' exhibits 6 and 7, being letters written by Francis O. Clarkson, President, Switzerland Company, one dated October 17, 1949 and the other dated April 25, 1950, both addressed to the defendant, Sam P. Weems, state among other things therein "I went over it with our Agent, Mr. Reid Queen" and in the other letter wrote, "Yes-

terday I was at Little Switzerland and went over the matter on the ground with out Agent, Mr. Reid Queen."

It is further found as a fact that Francis O. Clarkson, President Switzerland Company, in a letter to the defendant Weems, dated October 27, 1949, sends a copy of said letter to "Mr. Reid Queen, Little Switzerland, North Carolina."

I therefore conclude from all the evidence in this case that the said Reid Queen was the Agent of the plaintiff, Switzerland Company, and as such had authority to enter into leases as made and shown for its use and benefit.

When the last special use permit dated October 20, 1948, covering the access roads expired on December 31, 1958, and the Switzerland Company refused thereafter to execute the special use permit tendered it by the government as theretofore done, the two access roads were closed and barricaded at their entrance to and on the Parkway proper, on the 22nd day of April, 1960 — all at the direction of the National Park Service of the Department of the Interior.

This continued litigation stems and is centered wholly around the 10 ft. access from the Parkway to Kilmichael Tower.

Since the government's ownership of the lands involved in the right-of-way of the parkway and the problems herein must of necessity determine such ownership, and rights incident thereto, I have purposely found the above facts in detail.

The plaintiff, Joseph H. Walker, purchased the 25 acres claimed by him from one J. F. Jones in 1960. Jones in turn had purchased the identic land now held by Walker from the Switzerland Company in 1957. This land used the accesses to the Kilmichael Tower for ingress and egress to the parkway. The Switzerland Company owns approximately 80 acres allegedly affected by the Kilmichael Tower roadway access.

Following the closing and barricading of the two accesses to the Kilmichael Tower as set out, plaintiff, Switzerland Company, on April 14, 1961, filed a motion in the cause in the original condemnation proceeding in Mitchell County, which was tried at the March term, 1939, seeking to amend the judgment entered in such action by having it decree that the roads referred to in their complaint in this action were public roads; and served a copy of the motion on the Chairman of the North Carolina State Highway and Public Works Commission. At such time on motion of Stewart L. Udall, Secretary of the Interior of the United States was through some means, made an additional party defendant and service was undertaken to be had on him as such Secretary by mailing a copy of such motion and order by Registered Mail to his official place of residence in the District of Columbia. Thereafter Secretary Udall entered a special appearance in such cause and removed the action to the United States District Court for the Western District of North Carolina, Asheville Division, on the grounds of lack of jurisdiction of his person.

On a hearing before the undersigned, Secretary Udall's motion to dismiss was allowed and the action was thereupon remanded to the Superior Court of Mitchell County.

It would seem that a hearing on such motion to amend the original judgment of 1939 came on before Judge P. C. Froneberger of the Superior Court of North Carolina, and on the 27th of September, 1962, such judgment was amended as is shown by the exhibit attached to the complaint in the action. Obviously the amended judgment is of no validity in so far as the United States is concerned for that it was not a party to such motion and thereupon such is not binding on it or any Department or agency thereof.

Ironically, paragraph 15 of this motion in the cause to amend the 1939 judgment indicates that the plaintiff was

seeking a relief from the United States as such paragraph clearly shows: "That plaintiff owns approximately 80 acres of valuable land to the north of this obliterated access road, which land is rendered practically valueless due to the action of the United States Government."

On September 14, 1962, Joseph H. Walker, individually, as plaintiff, filed his complaint against the United States of America as defendant in civil action No. 2101 in the Charlotte Division, with jury trial demanded, in which he sought relief pursuant to Title 28 U.S. Code, Sec. 1346(b), alleging that his lands were damaged by the closing of the Kilmichael Tower road and its entrance to the Parkway and asking compensation therefor in the sum of $50,000.00.

In a similar action the Switzerland Company as plaintiff, instituted its action against the United States of America by the filing of its complaint on September 13, 1962, civil action No. 2102, in which it sought to recover the sum of $125,000, as its claimed damage for the closing of said access rights-of-way to the Kilmichael Tower road — bottoming its claim under Title 28 U.S. Code, Sec. 1346(b). Recovery in both of these actions is sought under the "Federal Tort Claims Act."

Answers were duly filed by the United States of America and these actions were pending for trial. However, on November 4, 1963, when this action was heard by the court in Charlotte, both the plaintiff Walker and Switzerland Company in open court, were permitted under their motions filed, to submit to voluntary dismissals of these two actions without prejudice.

Again an examination of the pleadings filed in these two tort claims actions against the United States somewhat clearly shows the plaintiffs' position in such filing.

In Paragraph 11 of the Switzerland Company's verified complaint, as is similarly shown in Paragraph 12 of the verified complaint filed by the plaintiff Walker, the following allegation appears:

> ". . . on or about April 22, 1960, the defendant (which is the United States in each case) through its agency, the Department of the Interior, and its agents, the Secretary of the Interior, the Director of the National Park Service, and the Director and employees of the Blue Ridge Parkway, who at all times were acting within the scope of their employment, wrongfully entered upon, or caused to be entered upon, the above described access roads, and, . . . closed said roads." (Parentheses added)

This allegation in each complaint, together with the allegations contained in the complaints as a whole seemed clearly to show that the plaintiffs regarded the things done by the agents and employees as being actions of the United States.

On the foregoing findings of fact, which admittedly are too long, but which seemed necessary in order to clearly present the evidence as it was offered at the trial, I conclude as a matter of law that plaintiffs were not entitled to the relief which they seek and that this action against the defendants should be and it is hereby dismissed. I come to that conclusion from a thorough study of the law under which the action is brought.

Plaintiffs set out in their complaint that this action is instituted under Title 28 U.S. Code 1361, enacted on October 5, 1962, as follows:

> A. 1361. *Action to compel an officer of the United States to perform his duty.*
>
> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or

employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

Prior to the enactment of this statute the district courts outside the District of Columbia had no authority to grant relief in the nature of a writ of mandamus, i.e., an order requiring a Government official to take affirmative action in the performance of his official duty, as distinguished from an injunction restraining a Government official from taking action determined to be not within his authority. Updegraff v. Talbott, 221 2d 342, 346 (C.A. 4); Marshall v. Crotty, 185 F. 2d 622, 626-7 (C.A. 1); United States v. Shurr, 102 U.S. 378, 393-4.

This statute was intended to give the District Courts, outside the District of Columbia, the same mandamus authority as that of the District Court for the District of Columbia. That is all that was intended. Page 2 of the Senate report reads as follows:

"This bill will not give access to the Federal Courts to an action which cannot now be brought against a Federal official in the United States District Court for the District of Columbia."

It is equally clear from both the Senate and the House reports that the Congress did not intend by the enactment of this statute to waive the government immunity from suits seeking mandatory relief. The Senate report, page 2, provides:

"This legislation does not create new liabilities or new causes of action against the United States Government."

The House report, page 1, provides:

"This bill does not create new liabilities for the Government."

The District Court did not have, prior to the enactment of this statute, and this statute did not give to the District Court, jurisdiction of a suit seeking mandatory or injunctive relief against the United States. This statute by its terms, is directed toward compelling "an official or employee of the United States or any agency thereof, to perform a duty owed to the plaintiff. United States v. Sherwood, 312 U.S. 594; United States v. United States Fidelity Company, 309 U.S. 506; United States v. Shaw, 309 U.S. 495.

The Senate Report, pages 1 and 2, provides:

> "The Purpose of the amendments is to provide specifically that the jurisdiction conferred on the district courts by the bill is limited to compelling a Government official or agency to perform a duty owed to the plaintiff or to make a decision, but not to direct or influence the exercise of discretion of the officer or agency in the making of the decision . . . First, it specifically grants jurisdiction to the district courts to issue orders compelling Government officials to perform their duties and to make decisions in matters involving the exercise of discretion, but not to direct or influence the exercise of the officer or agency in the making of the decision."

The actual purpose of this statute was to extend the power of the District Courts outside the District of Columbia to compel official action by mandatory order only in those cases involving nondiscretionary ministerial duties. This was the only power possessed by the District Court for the District of Columbia before the statute was enacted. Decatur v. Paulding, 14 Pet. 497, 514-517; Work v. United States ex rel. Rives, 267 U.S. 175, 177; Wilbur v. United States ex rel. Kadrie, 281 U.S. 206, 218; United States ex rel. Girard Trust Co. v. Helvering, 301 U.S. 540, 543.

An official action is not ministerial unless "the duty in a particular situation is so plainly described as to be free from doubt and equivalent to a positive command . . ." Wilbur v. United States ex rel. Kadrie, supra; United States ex rel. McLennan v. Wilbur, 283 U.S. 414, 420; Interstate Commerce Commission v. New York, N. H. & H. R. Co., 287 U.S. 178, 203-4; United States ex rel. Girard Trust Co. v. Helvering, supra.

Where the scope of an official's duties depends upon an interpretation of a statute the duty is not a ministerial one, enforceable by a mandatory order, unless the construction or application of the statute is so plain as to be free from doubt. Work v. United States, ex rel. Rives, supra; Wilbur v. United States ex rel. Kadrie, supra; Interstate Commerce Commission v. New York, N. H. & H. R. Co., supra; United States, ex rel. Chicago Great Western Railroad Co., v. Interstate Commerce Commission, 294 U.S. 60, 63.

In this case the duty of these officials depended upon the interpretation of the deed and other documents and the Court Proceedings involved in the acquisition of this property by the United States. The interpretation of this material is certainly not so plain as to be free from doubt.

Therefore, since the United States claims title to the access roads, within Section 2-L of the Blue Ridge Parkway, that are set out in this complaint, this action must therefore be considered, and I so determine, an action against the United States. The United States, not having consented to be sued, an action obviously will not lie. Belknap v. Schild, 161 U.S. 10; United States v. Sherwood, 312 U.S. 586; Maricopa County v. Valley Bank, 318 U.S. 357; Lynch v. United States, 292 U.S. 571, 581-582; Minnesota v. United States 305 U.S. 382, 387.

In a recent case of Malone v. Bowdoin, 369, U.S. 643, the Supreme Court, explaining and quoting from the case of Larson v. Domestic and Foreign Corp., 337, U.S. 682, has this to say:

> "Cutting through a tangle of previous decisions, the Court expressly postulated the rule that the action of a federal officer affecting property claimed by a plaintiff can be made the basis of a suit for specific relief against the officer as an individual only if the officer's action is not within the officer's statutory powers, or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void."

Dugan v. Rank, 372 U.S. 609, 31 Law Week 4347, decided April 15, 1963, involved an injunction suit against local officials of the United States Bureau of Reclamation. The Court decided that this was in reality a suit against the United States by stating:

> ". . . that the suit against the petitioning local officials of the Reclamation Bureau is in fact against the United States and they must be dismissed therefrom; that the United States either owned or has acquired or taken the water rights involved in the suit . . ."

I conclude therefore as follows:

1. That this is a suit against the United States and without its consent cannot be maintained by the plaintiffs.

2. The provisions of 28 U.S. Code, Sec. 1361 invoked by the plaintiffs as the authority under which their action was instituted, is not applicable in this case.

3. That the access roads leading to Kilmichael Tower from either side of the Blue Ridge Parkway are not public roads.

Counsel will submit decree.

This 17th day of January, 1964.

/s/ WILSON WARLICK
Wilson Warlick, United States District Judge for the Western District of North Carolina

JUDGMENT

This cause having been heard and the Court having filed its Memorandum Opinion wherein findings of fact and conclusions of law are made, the Court now Adjudges and Decrees pursuant to said Memorandum Opinion.

(1) That the plaintiffs are not entitled to the relief which they seek and this action against the defendants is hereby dismissed.

(2) That the costs of this action be taxed against the plaintiffs.

This the 23rd day of January, 1964.

/s/ WILSON WARLICK
United States District Judge

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 9385

Switzerland Company, a corporation,
and Joseph H. Walker,
Appellants,

versus

Stewart L. Udall, Conrad Wirth,
and Sam P. Weems,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA, AT ASHEVILLE. WILSON WARLICK, DISTRICT JUDGE

(Argued June 12, 1964. Decided September 30, 1964.)

Before SOBELOFF, Chief Judge, HAYNSWORTH, Circuit Judge, and HEMPHILL, District Judge.

Guy T. Carswell and James F. Justice (Francis O. Clarkson, Jr.; Carswell & Justice; and Craighill, Rendleman & Clarkson on brief) for Appellants, and Richard N. Countiss, Attorney, Department of Justice, and William Medford, United States Attorney (Ramsey Clark, Assistant Attorney General, and Roger P. Marquis, Attorney, Department of Justice, on brief) for Appellees.

HAYNSWORTH, Circuit Judge:

Concluding that this was an action against the United States to which it had not consented, the District Court dismissed this action brought nominally against three individuals who occupy the offices, respectively, of the Secretary of the Interior, the Director of the National Park Service and the Superintendent of the Blue Ridge Parkway. The relief sought by the plaintiffs is a compulsory removal of obstructions, deliberately erected by employees of the National Park Service, of a road, and the continuing maintenance of access over that road, to the Blue Ridge Parkway. We agree with the District Judge that this action for injunctive relief is not maintainable.

In 1909, the plaintiff, Switzerland Company, acquired a tract of some 1200 acres lying along the crest of the Blue Ridge Mountains, portions of which it proceeded to subdivide and develop as sites for summer residences. Some roads were laid out, and sometime later a stone tower, known as Kilmichael Tower, was constructed to provide residents and visitors with an unobstructed 360° view of the mountain scenery of the area. A road, ten feet in width, was constructed, running between Kilmichael Tower and other portions of Switzerland's lands, and this road came to be known as "The Kilmichael Tower-Wohlford Road." It is this road and access over it to the subsequently constructed Blue Ridge Parkway, which is the subject of controversy.

In 1937, at the request of the United States, the State of North Carolina by condemnation took a fee simple title to a strip of land, 200 feet in width, running through lands of the Switzerland Company. It also took certain related scenic easements. The land and the easements North Carolina thus acquired it conveyed to the United States in 1938. The deed recited that it was a transfer of the grantor's

proprietary estate and was not a surrender of state sovereignty. North Carolina expressly reserved the right to maintain "existing public roads" within the area, subject to location changes that might be effected by supplementary agreement. This grant, of course, was for the purpose of construction by the United States of the Blue Ridge Parkway, which was planned ultimately to connect the Shenandoah National Park in Virginia with the Great Smoky Mountains National Park in North Carolina-Tennessee.

Thereafter, the United States proceeded with the construction of a section of the Blue Ridge Parkway within the 200-foot wide strip acquired by it from North Carolina and running through lands of the Switzerland Company and others. As laid out, the Parkway crossed the Kilmichael Tower-Wohlford Road and other roads in the community known as Little Switzerland. When the trial of Switzerland's right to just compensation was held in 1939, this section of the Parkway and certain connections with existing roads were actually under construction. These included connections with the Kilmichael Tower-Wohlford Road on either side of the Parkway.

There was physical access to the Blue Ridge Parkway to and from Kilmichael Tower-Wohlford Road in either direction until 1960. For the latter portion of the period, however, there were in existence license agreements between the Park Service and the Switzerland Company, authorizing the connection as if for a private rather than a public road. In 1960, Switzerland insisted that it was not a gratuitous licensee, that it had an absolute right of access to the Parkway over the road, and it refused to accept a renewal license agreement. The Park Service then erected physical barricades which prevented access to the Parkway from either direction from the Kilmichael Tower-Wohlford Road. This

action effectively shut off access to the Tower and to certain lands, in the vicinity of the Tower, owned by the Switzerland Company and the individual plaintiff, Walker. We infer that it is important to the plaintiffs to establish a right of access to the Parkway rather than permissive access to the Parkway in order to develop their lands in that area for residential or commercial use. On the other hand, the National Park Service is intent upon the avoidance of acquisition of rights by prescription when there are no preexisting rights of access. Thus, this controversy ensued.

The plaintiffs claim that the National Park Service had no right to obstruct the Kilmichael Tower-Wohlford Road because it was a public road at the time of condemnation, reserved by North Carolina in its deed to the United States. The District Court concluded that it was not a public road within the meaning of the deed, and this conclusion is not without support. Its preliminary finding that the road originally was laid out for "public use" is not a contradiction, and it does not require a contrary conclusion. Undoubtedly the Switzerland Company wished to make its Kilmichael Tower accessible to the public, but, during some of this period, at least, it charged admission fees to the Tower. During one winter when the tower was being damaged by vandals, the Switzerland Company, itself, closed the road to avoid further depredation. In a deed to the predecessor in title to the plaintiff, Walker, the Switzerland Company included a reservation of control of the road, and the same reservation for Switzerland's benefit was included in the subsequent deed to Walker.

Whether the public may have acquired some interest in the road, however, is not determinative of the plaintiffs' factual contention. Though it may have been laid out for use by the public and though it may have been used by the

public, the question is whether or not it was a public road as that term was used in the reservation in the deed from North Carolina to the United States. That question is not answered by a finding that the public had used the road or that its constructor had intended that the public use it.

The intention of the parties to the deed from North Carolina to the United States is persuasively indicated by a supplemental agreement executed some three months after delivery of the deed. This agreement purports to provide for the location and construction of every crossing of every public road with the Blue Ridge Parkway in the area. It specifically provides for four such crossings in the Little Switzerland community, one of which was to be by a grade separation structure without interchange of traffic, while the other three were to have access roads or were to be crossings at grade. The Kilmichael Tower-Wohlford Road was not mentioned in any way in the supplemental agreement purporting to cover all public roads within the reservation clause of North Carolina's deed. North Carolina never has maintained this road, and, if it had intended to reserve the right of maintenance, the reasonable inference is that the road would have been mentioned in the agreement which purports to be all inclusive of the roads to which the reservation was intended to apply.[1]

We have set forth the underlying facts and the substantive contentions of the parties, not for the purpose of reviewing

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[1]Plaintiffs urgently argue that the supplemental agreement should be construed as applying only to public roads which were to be relocated. We are not persuaded that narrow construction is correct. The reservation in the deed does contemplate a subsequent agreement on location changes, but the agreement actually executed deals with the public roads in the area which were not to be relocated as well as those which were. Moreover, the Kilmichael Tower-Wohlford Road, though unmentioned in the supplemental agreement, was actually relocated. As reconstructed, one traveling from one end of that road to the other would travel for a short distance on the Parkway

the merits of the ultimate conclusion of the District Judge that the road in question was not a public road within the meaning of the reservation in North Carolina's deed,[2] but for the purpose of putting the controversy in its context. It is apparent that the plaintiffs are contending, as bounding owners on a public road, that they are entitled to continued access to the Parkway because the United States, in acquiring the fee simple title to the strip of land, acquired no right from North Carolina to close the public roads. On the other hand, it has been the position of the National Park Service that it has a right to close this road, a private road in its view, and, indeed, that under the authorizing statute it has no power to grant more than a terminable, permissive right to use this road within the boundaries of the land the United States owns in fee. If the plaintiffs are granted the relief they seek, of course, the employees of the National Park Service, under the direction of the individual defendants, will be required to remove the obstructions and barricades and provide continued access from the Kilmichael Tower-Wohlford Road to the Blue Ridge Parkway.

It is under these circumstances that we face the preliminary question as to whether or not this action is maintainable against the three individual defendants, or whether it was properly dismissed as, in substance, a suit against the United States for injunctive relief to which the United States has not consented.

In United States v. Lee, 106 U.S. 196, it was held that an individual might maintain an action for the possession of land against individuals wrongfully withholding possession from him, though the individuals were employees or officials of the United States and acting for it. The Court

[2]Our statement that the District Court's finding of ultimate fact is not unsupported, is not intended as an indication that the fact-finder in some subsequent proceeding might not find the facts differently.

thus rectified the wrongful seizure by the United States of the George Washington Parke Custis estate, known as Arlington, upon which Arlington National Cemetery is now located.

The general principle that the sovereign's wrongs may be rectified by ejecting its servants has not survived without substantial qualification, however.

It is difficult to find complete consistency in application of the rule of the Lee case prior to 1949. Though long after passage of the Tucker Act, however, it exhibited substantial vitality in 1947 when the Supreme Court decided Land v. Dollar, 330 U.S. 731, as it had earlier when Colorado v. Toll, 268 U.S. 228, and Goltha v. Weeks, 271 U.S. 536, were decided. The tide set definitely in the other direction, however, with Larson v. Domestic & Foreign Corp., 337 U.S. 682.

In Larson, it was held that an action for equitable relief may be maintained against a governmental agent, without the necessity of joining the sovereign, only if the statute which purportedly authorized his conduct was unconstitutional in its application or the agent's act was beyond his delegated authority. And the bounds of his delegated authority, the Court held, were determinable as in the common law of agency. The delegated authority encompasses not only decisions of the agent which are right, but those which are wrong and harmful to the claimant. The Court, thus, specifically rejected the notion that when a governmental agent's conduct is tortious, as where he wrongfully interferes with the plaintiff's possessory rights to property, he may not shield himself behind the doctrine of sovereign im-

munity.[3] The Courts' explanation of Lee demonstrates Lee's inapplicability to this case in view of the existence of a provision for payment of compensation.

This is manifest in the subsequent decision of Malone v. Bowdoin, 369 U.S. 643. That was an action of ejectment against a Forest Service officer to try title to land. It was conceded that the defendant acted within his delegated authority, since the Forest Service claimed the land under a deed. On that account, despite the fact that the plaintiffs might have been able to prove theirs the superior title and an exclusive right of possession, it was held that the action could not be maintained.

The only difference between Lee and Malone is the existence now of means for the recovery of damages for the wrongful taking. That difference was held in Malone to be critical, and the availability of damages is now held to foreclose equitable remedies.

The effect of the erection of the doctrine of sovereign immunity to foreclose equitable actions is to prohibit equitable remedies without consideration of the adequacy of the legal remedy or, indeed, of the interest of the United States. The result is that every claim advanced by an overly zealous agent of the sovereign and by those multitudes of governmental agents who feel unauthorized to relinquish a governmental claim, however baseless it may appear, effects an informal seizure as if by condemnation. It is done, however, without consideration of the appropriateness of condemna-

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[3]Even under the rejected notion, of course, equitable relief could be granted only if the force of the decree would be expended upon the errant agent and without imposing burdens upon funds or property unquestionably belonging to the sovereign. See the dissenting opinion of Mr. Justice Frankfurter in Larson p. 712.

tion or a comparison of the potential advantage to the United States with the cost of payment of just compensation.[4]

Dugan v. Rank, 372 U.S. 609, and Hawaii v. Gordon, 373 U.S. 57, are not so relevant here as Larson and Malone. They do illustrate the renewed and abounding vigor of the doctrine of sovereign immunity as now applied by the Supreme Court. They, the most recent pronouncements on the subject, indicate no disposition to consider a retreat from Malone. And Dugan v. Rank clearly instructs us that equitable relief against governmental offiers cannot be allowed when the requested relief would affect the administration of a governmental project and require congressionally unauthorized expenditures by the United States, nothwithstanding that payment of just compensation, the open alternative, might be a greater burden upon the public treasury.

We take our cue, of course, from the decisions of the Supreme Court. If some of us, appraising the policy considerations, were inclined to assign a more restricted role to the doctrine of sovereign immunity in this area, we could not follow our inclination when the Supreme Court, clearly and currently, is leading us in the other direction.

Applying the doctrine as recently developed by the Supreme Court, the plaintiffs cannot prevail. There is no suggestion of constitutional invalidity of any statute under

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[4]The present case is illustrative. The Park Service has no objection to maintenance of access to the Parkway here if only the plaintiffs would agree with it that their use is permissive. The United States has no independent interest in, or advantage to be gained from, a continuing closure of these roads. If it should ultimately be determined, however, that Park Service officers were mistaken in their interpretation of the plaintiffs' rights, then their conscientious assertion of the protective, but erroneous, claim has occasioned a taking of rights of access to large tracts of land. Just compensation for that taking would probably be extremely disproportionate to the value, if any and none is apparent, to the United States of the physical closure of this road at its connections with the Parkway.

which the defendants and their subordinates have acted. Construing the plaintiffs' rights of access to a federally owned parkway over federally owned land to be permissive only, they clearly acted within the scope of their authority in declining to acquiesce in the plaintiffs' assertions of greater rights. Whether their determination of the plaintiffs' rights was correct or erroneous and their acts lawful or tortious, they did not depart from their delegated authority as Larson clearly holds.

The United States owns in fee the land where the obstructions to the road are maintained. The statute, 16 USCA § 460a-2 authorizes these defendants to administer those lands. All of this the plaintiffs conceded. If, in 1938, the road now closed was a public one within the meaning of the reservation in North Carolina's deed, if, regardless of the status of the road, the plaintiffs have an access easement because Switzerland's right of access to the now isolated lands was not effectively condemned in 1938, the defendants and their subordinates have wrongfully exercised their delegated authority, but they have not exceeded it. The scope of the delegated authority to administer the lands of the United States is not restricted by possible or actual encumbrances upon the Government's title. If the defendants have committed a wrong in the exercise of their delegated authority, if their administration of the land has deprived others of the enjoyment of their legal rights, a departure from the delegated authority is not shown. This is the plain holding of Larson.

The plaintiffs cannot bring themselves within either of the two exceptions to the rule of immunity which are now recognizable.

That this is, in substance, an action against the United States is also illustrated by the nature of the relief sought

and the relation of the individual defendants to the alleged wrong.

The plaintiffs seek the return of no specific res. They seek a judgment declarative of their rights as against the United States. This is apparent in their joinder as defendants of individuals, occupying high governmental offices, who could have had no personal involvement in the little incidents giving rise to this controversy. The subordinates who erected the barricades are not the defendants, but their ultimate superiors, who obviously are made so only because of their offices.[5]

We conclude that this action cannot be maintained because of the sovereign immunity of the United States. In substance, it is an action against the United States. Since the United States, an essential party, has not consented to be sued, the action must be dismissed.

This leaves the plaintiffs to the pursuit of such remedies as they may have for the collection of just compensation for taking their access to their properties.

The defendants here contend that the taking occurred in 1937 and that compensation was paid for it as a result of the condemnation proceeding in 1939. This contention is an outgrowth of the defendants' basic contention that the road was a private one and thus not excluded from the deed of North Carolina. It is buttressed by Switzerland's insistence in the 1939 condemnation trial that it had no assurance of access. It is greatly weakened, however, by North Carolina's insistence in the condemnation trial that access would be preserved, and that position was dramatically supported by employees of the United States who testified that the physical connections between the Parkway and this road were actually

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[5]See the dissenting opinion of Mr. Justice Frankfurter in Larson v. Domestic & Foreign Corp., 337 U.S. 682, 712.

under construction at the time of trial. The jury might well have thought that Switzerland was not being deprived of what government employees were busily engaged in providing for it and assuring to it. Regardless of the ultimate resolution of the question of the status of this road in 1938, therefore, there is a substantial question whether the United States may now contend that Switzerland's right of access over it was condemned in 1937 and compensation paid for it in 1939. If not, there may have been no appropriation of Switzerland's rights of access to its lands in the vicinity of the tower until the barricades were erected and the road physically closed, at which time a claim for just compensation would have arisen.

Those are questions for another day, however. They are not cognizable in this action for equitable relief only.

Affirmed.

APPLICABLE CONSTITUTIONAL PROVISIONS AND STATUTES

The following provisions of the United States Constitution and of the United States Code are resolved in this case:

"AMENDMENT V.

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

"Tit. 16 USC, Sec. 460a-2. Blue Ridge Parkway; establishment; administration

All lands and easements heretofore or hereafter conveyed to the United States by the States of Virginia and North Carolina for the right-of-way for the projected parkway between the Shenandoah and Great Smoky Mountains National Parks, together with sites acquired or to be acquired for recreational areas in connection therewith, and a right-of-way for said parkway of a width sufficient to include the highway and all bridges, ditches, cuts, and fills appurtenant thereto, but not exceeding a maximum of two hundred feet through Government-owned lands (except that where small parcels of Government-owned lands would otherwise be isolated, or where topographic conditions or scenic requirements are such that bridges, ditches, cuts, fills, parking overlooks, landscape

development, recreational and other facilities requisite to public use of said parkway could not reasonably be confined to a width of two hundred feet, the said maximum may be increased to such width as may be necessary, with the written approval of the department or agency having jurisdiction over such lands) as designated on maps heretofore or hereafter approved by the Secretary of the Interior, shall be known as the Blue Ridge Parkway and shall be administered and maintained by the Secretary of the Interior through the National Park Service, subject to the provisions of sections 1 and 2-4 of this title, the provisions of which sections, as amended and supplemented, are extended over and made applicable to said parkway: PROVIDED, that the Secretary of Agriculture is authorized, with the concurrence of the Secretary of Interior, to connect with the parkway such roads and trails as may be necessary for the protection, administration, or utilization of adjacent and nearby national forests and the resources thereof: AND PROVIDED FURTHER, That the Forest Service and the National Park Service shall, insofar as practicable, coordinate and correlate such recreational development as each may plan, construct, or permit to be constructed, on lands within their respective jurisdictions which, by mutual agreement, should be given special treatment for recreational purposes. June 30, 1936, c.883, 49 Stat. 2041; June 8, 1940, c.277, Sec. 1, 54 Stat. 249."